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Supreme Court of the United States

OCTOBER TERM—1956

Docket No. .....

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,

Petitioner and Appellee,

—against—

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Respondents and Appellants.

BRIEF OF RESPONDENTS JOSEPH REINFELD, RENFIELD IMPORTERS, LTD. AND HAROLD C. LEVIN (RENFIELD) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The petitioner's decedent (the plaintiff) invoked jurisdiction of the District Court solely because of diversity of citizenship (R 13, 25-26). Plaintiff had judgment on a jury verdict which found, according to allegations of the original and supplemental complaints, that respondents had conspired to defraud the plaintiff in respect of two transactions referred to as (a) The L. L. & B. Claim and

(b) The Browne-Vintners Old Claim (R 13-19, 25-32, 2560-62).

The L. L. & B. Claim was made in the original complaint filed July 1, 1948 (R 1). It alleged in substance: Plaintiff and respondent Joseph Reinfeld were partners; after Reinfeld had successfully negotiated an agreement on behalf of the partnership on July 2, 1931 for the acquisition of a small distillery in Ontario, Canada, known as the L. L. & B. distillery, which had just about been completed and never operated, he conspired with respondents Samuel and Allen Bronfman to deprive the plaintiff of his interest in this partnership asset by permitting the Bronfmans to acquire title to the distillery in return for secret emoluments given him by them (R 13-19).

The Browne-Vintners Old Claim was made in the supplemental complaint filed November 13, 1951 (R 5). It alleged: Plaintiff and Reinfeld, as partners, owned stock interests held in the names of Reinfeld and other nominees in Browne-Vintners Co. Inc. (Browne-Vintners Old), a New York corporation engaged in the wholesale liquor business. In December 1940, pursuant to the original 1931 conspiracy, respondents agreed that Reinfeld would cause the business and assets of Browne-Vintners Old to be sold for an inadequate price to Distillers Corporation-Seagrams, Limited (Distillers-Seagrams). Among the assets thus sold were three agencies in the United States for Cointreau, Piper Heidsieck and Remy Martin. These agencies were later transferred in 1945 to respondent Renfield Importers, Ltd., which was controlled by Reinfeld and defendant Harold C. Levin (Renfield). The transfer, which plaintiff did not discover until 1948, was part of the consideration to Reinfeld for his part in the L. L. & B. transaction (R 25-32).

These claims were denied in their entirety, and on the appeal from the judgment it was urged on behalf of those

respondents whom we represent that the record was devoid of proof sufficient to establish any liability on the part of the respondents Renfield Importers, Ltd. and Harold C. Levin (Renfield); that there was no substantial evidence of the alleged conspiracy; and that defenses of general release, assignment, illegality and limitations should have precluded the judgment and warranted its reversal. The Court of Appeals reversed and dismissed the complaints upon the last two defenses, but did not deem it necessary to consider the others.

At the close of plaintiff's case respondents moved for dismissal of the complaints. At the end of the entire case they renewed their motions to dismiss and moved for a directed verdict. After the verdict respondents moved to set it aside and for judgment in accordance with their motions for a directed verdict (Fed. Rule Civ. Proc. 50). Decision of these motions was reserved, but they were all ultimately denied (R 2542-59). 122 F. Supp. 265.

The motions were based upon the grounds, among others, that both the L. L. & B. and Browne-Vintners Old Claims were unenforceable because of (1) limitations and (2) illegality (R 2549, 2554).

(1) As to Limitations

The trial judge submitted to the jury special questions bearing upon the defenses of limitations which the jury answered thus:

> The L. L. & B. Claim arose December 15, 1931. Plaintiff became aware of the claim in May 1946. Plaintiff should have become aware of the claim in the exercise of reasonable care between December 1931 and December 1932.
>
> The Browne-Vintners Old Claim arose December 20, 1940. Plaintiff did not become aware of the claim

until January 1948. Plaintiff should have become aware of the claim in the exercise of reasonable care some time in 1947 (R 2530-31).

Despite these findings of fact, the trial judge refused to sustain the defenses of limitations under the New York statutes, which, as he found and petitioner concedes, are applicable (Pet. 13). He said the complaint "alleged a single wrong of conspiracy" (R 2551); and applying the rule of criminal conspiracy, he held that the period of limitations did not begin to run until the last overt act in furtherance of the conspiracy (R 2553).

He decided further that the applicable New York statute was Civil Practice Act, § 48, subd. 5, governing cases of fraud and deceit, and that the six-year limitation there prescribed did not start to run until the Browne-Vintners Old transaction was either actually discovered (January 1948) or should have been discovered (1947). Therefore, the single conspiracy claim was not barred by lapse of time (R 2551-53).

The Court of Appeals took quite a different view (Pet. App. A, 21-37). 229 F. 2d 248. It did not, however, as petitioner erroneously states, reverse "the determination of the District Court jury" (Pet. 2). Rather, in sustaining the defenses of limitations, it accepted, as had the plaintiff and the respondents, the jury's answers to the special questions of the trial judge; but it held that, on the basis of those answers, both the L. L. & B. and the Browne-Vintners Old Claims were barred by the applicable New York Statutes of Limitations as construed by the Court of Appeals of the State of New York (Pet. App. A, 25-29).

The Court of Appeals held that "the damage for which recovery may be had in a civil action is not the conspiracy itself but the injury to the plaintiff produced by specific

overt acts," and that "the statute therefore begins to run at the moment such injury occurs" (Pet. App. A, 26). For this conclusion the court relied on *Lewis Invisible Stitch Mach. Co.* v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2nd Cir. 1936) in which Judge Learned Hand followed the leading New York case of *Green* v. *Davies*, 182 N. Y. 499, 504 (1905), which in turn was based on *Brackett* v. *Griswold*, 112 N. Y. 454, 466 (1889) holding: "The allegation that there was a conspiracy to commit the fraud does not effect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy."

Applying these well-settled principles, the Court of Appeals made the following dispositions:

As to the L. L. & B. Claim, the Court held that, even assuming the claim was really one for fraud and deceit and therefore limited by the New York six-year statute (Civil Practice Act, § 48, subd. 5), the period of limitations began at the latest in December 1932 when, as the jury found, the plaintiff should have become aware of the claim in the exercise of reasonable care; citing *Higgins* v. *Crouse*, 147 N. Y. 411, 416 (1895).* Hence, the plaintiff was barred from recovery on the L. L. & B. transaction long before the original complaint was filed on July 1, 1948 (Pet. App. A, 26-27).

As to the Browne-Vintners Old Claim, the Court held that, assuming the sale was for an inadequate consideration and induced by the later transfer of the three liquor agencies, the alleged wrong was not to the plaintiff personally, but to the New York corporation, Browne-Vintners Old. Any claim for that wrong therefore belonged to the corporation and was enforceable by it or on its behalf. As

* This case had been recognized by the trial judge as representing the New York law in *Warner* v. *Republic Steel Corp.*, 103 F. Supp. 998, 1009 (S. D. N. Y. 1952).

such, the claim was governed by New York Civil Practice Act, § 48, subd. 8 which requires that suit be commenced within six years from the date when the claim accrued, i.e., from the date of the wrong regardless of the date of its discovery by the plaintiff; citing *Hastings* v. *H. M. Byllesby & Co.*, 293 N. Y. 404, 411-412 (1944), cert. denied *sub nom. Hastings* v. *Haystone Securities Corp.*, 324 U. S. 860 (1945); *Gottfried* v. *Gottfried*, 269 App. Div. 413 (1st Dept. 1945); *Zwerdling* v. *Bent*, 291 N. Y. 654 (1943). The claim having arisen, as the jury found, on December 20, 1940 when Browne-Vintners Old was sold to Distillers-Seagrams, the statute ran from that date and not from the time when Reinfeld allegedly received secret emoluments pursuant to the alleged conspiracy. Even so, the last act of claimed damage took place in August 1945 when the Piper Heidsieck agency was acquired by Renfield Importers, Ltd. Since the Browne-Vintners Old Claim was not sued upon until the supplemental complaint was filed November 13, 1951, it was by then barred by the six-year limitation of Civil Practice Act, § 48, subd. 8 (Pet. App. A, 27-29).

(2) As to Illegality

At the trial plaintiff adduced evidence as part of his own case that at the time of the L. L. & B. transaction plaintiff and Reinfeld, with others, were members of a bootlegging "partnership" or syndicate engaged in the importation of whiskey into the United States in violation of the National Prohibition Law (R 53-58, 245, 280-83, 305).* This admittedly was the partnership which was to acquire the L. L. & B. distillery (Pet. 16).

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* The evidence was substantially the same as that in *Rutkin* v. *United States*, 343 U. S. 130 (1951) summarized at 132-134 (Pet. App. A, 29).

The District Judge did not submit the question of illegality to the jury (R 2489-90, 2494; Pet. App. A, 32). Nevertheless, he held that on the evidence "the triers of the fact may have found that acquisition of the Canadian distillery was with a view to sell its products in the United States after repeal" (R 2555).

The Court of Appeals held, on the very proof adduced at the trial by the plaintiff himself, that "the evidence here is so clear and convincing that in 1931 Rutkin and Reinfeld intended the L. L. & B. distillery operation to be a part of their business of illegally importing liquor into the United States that the trial judge should have dismissed that part of the case having to do with the L. L. & B. transaction" (Pet. App. A, 33). Plaintiff, said the Court, having been a member of a criminal partnership bent on effecting the illegal purpose of the L. L. & B. transaction, was not entitled to enforcement of any rights based on the L. L. & B. contract and depending on the illegal partnership agreement; citing *McMullen* v. *Hoffman*, 174 U. S. 639 (1899), cited with approval in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 756, n. 4 (1946); *Rosenblum* v. *Frankel*, 279 App. Div. 66 (1st Dept. 1951); *Parise* v. *Pepe*, 270 App. Div. 769 (2d Dept. 1951); *O'Connor* v. *O'Connor*, 263 App. Div. 820 (2d Dept. 1941). In so holding, the Court of Appeals rejected, as contrary to New York law, plaintiff's contention that later repeal of the Eighteenth Amendment served to validate the illegal L. L. & B. transaction; citing *Toll* v. *Friedman*, 272 App. Div. 587 (1st Dept. 1947); *Dunmar Robes, Ltd.* v. *Buenaventura*, 279 App. Div. 286 (1st Dept. 1952); *Government of the French Republic* v. *Cabot*, 190 Misc. 517 (Sup. Ct. N. Y. Co. 1947) (Pet. App. A, 33-35).

At the trial it also developed as part of plaintiff's case that his alleged stock interest in Browne-Vintners Old

did not appear on the corporate books because, as he testified, "I was in the bootlegging business" (R 295-96). For this very reason, with plaintiff's full knowledge and consent, his interest was not disclosed to the New York State liquor authorities when Browne-Vintners Old applied for a liquor license (R 76-79, 216). The disclosure was not made despite the fact that both the New York Alcoholic Beverage Control Law, § 110 and the license application made pursuant thereto required all applicants to "state the name and residence of each person interested, or to become interested, in the traffic of liquor for which the application is made, together with the nature of such interest" (Exh. 8, R 2596).

The District Court nevertheless held that "plaintiff's claim for fraud in the sale of the corporation cannot be fairly characterized as an integral part of the violation"; and added, "[i]n any event, it was not plaintiff, but some of the defendants in control who omitted any disclosure required to be made, and this circumstance significantly distinguishes situations where the claimant himself perpetrated the concealment" (R 2556).

But the Court of Appeals considered that "[t]his view completely disregards Rutkin's sworn testimony that it was understood by him, by Reinfeld and by the other partners at the 1933 meeting that his interest, and other interests as well, would not be disclosed. Since he participated in the illegality his claim is clearly unenforceable under the rule of the *Flegenheimer* case" (Pet. App. A, 37).

Therefore, said the Court of Appeals, plaintiff "[h]aving failed to disclose his interest as the law requires, he may not now assert that interest in a court of law" (Pet. App. A, 36). For this it relied on the leading New York case of *Flegenheimer* v. *Brogan*, 284 N. Y. 268 (1940), 132 A. L. R. 613, and the decisions of lower New York courts in *O'Connor*

v. *O'Connor*, *Rosenblum* v. *Frankel* and *Parise* v. *Pepe*, all above; and *Romano* v. *Bono*, 168 Misc. 897 (Sup. Ct. Kings Co. 1938).

The trial judge having reserved decision on respondents' motions for dismissal, to set aside the verdict and for a directed verdict, and the Court of Appeals having found that the evidence presented no determinative fact questions for the jury and that principles of New York law were dispositive of the entire case, it was not required, as petitioner contends (Pet. 3),* to remand the case to the District Court for a new trial and it appropriately directed dismissal of the complaints. Fed. Rule Civ. Proc. 50(b); *Baltimore & Carolina Line Inc.* v. *Redman*, 295 U. S. 654 (1935).

Reasons for Denial of the Writ

As the foregoing Statement of the Case shows and as the very questions posited by the petition demonstrate (Pet. 3), this suit involves necessarily and exclusively the proper interpretation and application of New York law, statutory and common, in a purely private controversy not affected with a public interest. As such, it is not a proper case for certiorari.

Argument

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Supreme Court Rule 19. The Rule embodies the criteria by which the Court determines whether a particular case merits consideration, with due regard to the proper func-

* Although petitioner states this as one of the "questions presented" and as one of the "reasons for the allowance of the writ" (Pet. 3, 9), the petition does not argue the point.

tioning of the limited reviewing powers to which this Court is confined. *Rice* v. *Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U. S. 70, 73-74 (1955).

In considering the defenses of limitations and illegality in the case at bar the lower courts were, as petitioner concedes (Pet. 13), required to apply New York law as declared in statutes of the State and decisions of its highest court. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Klaxon Company* v. *Stentor Electric Manufacturing Co., Inc.*, 313 U. S. 487 (1941); *Guaranty Trust Co.* v. *York*, 326 U. S. 99 (1945). Hence, the only criterion of Rule 19 possibly applicable here is the one which declares that certiorari may be granted "where a court of appeals has decided an important state * * * question in a way in conflict with applicable state * * * law." Rule 19, subd. 1(b). But the instant case clearly does not fall within this category.

First. However important the case may be to the petitioner, the questions decided are not "of such gravity and general importance as to require the review of the conclusions of the * * * Court of Appeals in reference to them." *In re Woods, Petitioner*, 143 U. S. 202, 206 (1892); *Fields* v. *United States*, 205 U. S. 292, 296 (1907). They are not "questions of importance which it is in the public interest to have decided by this Court of last resort." *Magnum Import Company, Inc.* v. *Coty*, 262 U. S. 159, 163 (1923).

Second. There has been an utter failure to overcome the presumption that the Court of Appeals did *not* decide the questions involved "in a way in conflict with applicable state law." Rule 19, *supra*. This Court has said: "The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and do not review, save in exceptional cases the

considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston et al.* v. *Dwyer, et al.*, 322 U. S. 232, 237 (1944). And again: "Where the lower federal courts are applying local law, we will not set aside their ruling except on a plain showing of error." *Palmer et al.* v. *Hoffman*, 318 U. S. 109, 118 (1943), rehearing denied, 318 U. S. 800 (1943). This judicial policy was applied in a case involving questions of state law identical with those presented here, i.e., (a) limitations and (b) illegality, in which this Court refused to disturb "the interpretation placed upon purely local [Texas] law by a Texas federal judge in answering these questions." *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438-439 (1947), rehearing denied, 329 U. S. 834 (1947).

Third. Actually, the questions involved were not decided by the Court of Appeals in a way in conflict with applicable state law. Rather, they were determined in conformity with that law. (See discussion *supra*, pp. 4-6.)

(1) As to Limitations

Petitioner has not presented one case in any jurisdiction holding, as he contends, that in a civil suit for conspiracy the applicable statute of limitations does not begin to run until the date of the last overt act in furtherance of the conspiracy (Pet. 10-15). He cites only cases of criminal conspiracy and ignores, as did the District Court, the "important distinction," recognized by the Court of Appeals, "between the rule applicable in civil and that applicable in criminal cases" (Pet. App. A, 26). As we have seen, in so holding the Court of Appeals applied the settled law of New York as enunciated in *Green* v. *Davies*, 182 N. Y. 499, 504 (1905), which petitioner recognizes as authoritative (Pet. 11). Petitioner also defers, as he must, to *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913) and *Lewis Invisible*

Stitch Mach. Co. v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2nd Cir. 1936), both relied on by the Court of Appeals; but he makes an ineffectual effort to distinguish them from the case at bar (Pet. 11-12).

The cases cited by petitioner in this connection do contain language which, superficially read, might indicate that there is "a cause of action for conspiracy," as such. *Duane Jones Company, Inc.* v. *Burke*, 306 N. Y. 172, 190 (1954) quoting from *Kveiczky* v. *Lorber*, 290 N. Y. 297, 306 (1943). But in both cases the actionable wrong was in reality an unlawful injury to plaintiff's business, although inflicted as the result of concerted action by the defendants. In those cases the courts were neither called upon to sustain the sufficiency of a civil conspiracy as a separate cause of action, nor to consider the bar of the statute of limitations. And even were we to concede, for argument's sake, the existence of "a cause of action for conspiracy," that would not alter the settled law as stated in *Williamson* v. *Columbia Gas & Electric Corp.*, 186 F. 2d 464, 469 (3rd Cir. 1950):

> "In a civil conspiracy suit each invasion of plaintiff's interest resulting from the conspiracy creates a new cause of action *when the question is the application of the bar of the statute of limitations.*" (Emphasis ours.)

Here, therefore, there were in reality two separate and distinct causes of action made the bases of suit—the L. L. & B. Claim and Browne-Vintners Old Claim.

Even reading the L. L. & B. Claim as one for fraud and deceit and hence governed by the New York six-year statute (C. P. A. § 48, subd. 5), the period of limitations began to run from the time when the plaintiff, in the exercise of reasonable diligence, should have discovered the fraud. *Higgins* v. *Crouse*, 147 N. Y. 411, 416 (1895). Petitioner

does not contend that the applicable New York law is otherwise; but now for the first time he quarrels with the jury's finding that plaintiff should have discovered the claim between December 1931 and December 1932. Petitioner argues that the "testimony" showed a partnership or fiduciary relationship between plaintiff and Reinfeld and that "clews, [sic] which would cause persons dealing at arm's length to promptly make inquiry, would not serve to put a person dealing with another in a fiduciary capacity on guard" (Pet. 14). Assuming this jury question were still an open one, it is purely a question of fact peculiar to this case which the Court will not review by certiorari. See Justice Roberts' dissent in *Deputy et al.* v. *du Pont*, 308 U. S. 488, 500-501 (1940).* Of course, as plaintiff's own testimony shows, he became fully aware of the L. L. & B. Claim almost as soon as it first arose (R 74-76, 286-288).

The Circuit Court's holdings that the Browne-Vintners Old Claim belonged to the corporation; was enforceable only by the corporation itself or a stockholder suing on its behalf; was governed therefore by the six-year statute (Civil Practice Act, § 48, subd. 8); and accrued from the date of the wrong, regardless of the date of its discovery—all are based upon unimpeachable New York authority which petitioner does not even attempt to question (Pet. 14-15). The jury having found that the Browne-Vintners Old Claim accrued December 20, 1940, the claim was clearly barred by the six-year limitation when it was first asserted in the supplemental complaint filed November 13, 1951. This is so even though the claim be regarded as having accrued when the last alleged secret emolument was received in August 1945 (Pet. App. A, 27-29).

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* Described as "one of the most explicit statements of the function of certiorari which has appeared in the reports." 53 Harvard Law Rev. 579, 590-591, n. 22.

Petitioner's quarrel with this holding appears to be that "it completely casts aside the evidence of the intent of the partners and runs away from the plain facts of the case" (Pet. 15). But this is just another attempt to obtain review by this Court of evidentiary facts peculiar to the case at bar—an effort which must meet with failure. See letter of Chief Justice Hughes to Senator Wheeler reprinted in Sen. Rep. No. 711, 75th Cong., 1st Sess. (June 14, 1937) 38, 39.

(2) As to Illegality

The illegality of the alleged "liquor partnership" is not contested by petitioner. And he concedes that the L. L. & B. distillery was to be acquired, if at all, by and for the use of that partnership (Pet. 16).

In attempting to overcome the defense of illegality, however, plaintiff contended in the District Court that the product of the distillery was not to be used within the United States until after repeal of the National Prohibition Act. But, as the Court of Appeals held, "the evidence here is so clear and convincing that in 1931 Rutkin and Reinfeld intended the L. L. & B. distillery operation to be a part of their business of illegally importing liquor into the United States that the trial judge should have dismissed that part of the case having to do with the L. L. & B. transaction" (Pet. App. A, 33). And this holding, it should be noted, is based exclusively on the proof made *by the plaintiff* at the trial (R 55-56, 68, 71-77, 175-176, 287, 289-290, 649, 688-693, 944-945).

The petitioner claims that this determination is erroneous because, so he argues, "[t]he evidence did not indicate an illegal act in the planned acquisition of the L. L. & B. Distillery by the liquor partnership * * *." And he characterizes the finding of the Circuit Court that the distillery

was to be acquired for "immediate importation of liquor into the United States" as an "erroneous assumption" and "in utter disregard of other pertinent testimony" (Pet. 16).

Even were this position correct, still it does not thereby present a question meriting certiorari. For petitioner in effect is asking this Court to review the evidence and to arrive at a conclusion different from that of the Circuit Court—"a conclusion based solely upon the peculiar facts of this single case." This does not come within the function of this Court "to settle important principles of law." Roberts, *J.*, dissenting in *Deputy* v. *du Pont, supra,* at 500, 501.

There is, and indeed there can be, no quarrel with the principle of law, prevailing in New York and other jurisdictions and applied by the Court of Appeals, that the courts will not recognize an illegal transaction nor enforce "rights" depending upon illegal agreements (Pet. App. A, 34).

Appellants' position that the repeal of Prohibition erased the taint of illegality from the L. L. & B. transaction is contrary to New York law (Pet. App. A, 34-35).

The illegality of the Browne-Vintners Old Claim rests entirely upon the public policy of New York declared in its Alcoholic Beverage Control Law § 110, as construed and applied by its highest and lower courts (Pet. App. A, 36-37).

In this connection, petitioner cites here, as plaintiff did below, *Rosasco Creameries, Inc.* v. *Cohen,* 276 N. Y. 274 (1937), holding that a *milk dealer*, though not licensed as required by law, may nevertheless recover on a contract for the sale of milk, as authority for the contention that although plaintiff's interest in Browne-Vintners Old was deliberately and with his consent concealed from the New

York State Liquor Authority, that interest may nevertheless be made the basis of a recovery in the New York courts (Pet. 19). But the *Rosasco* case was distinguished in *Carmine* v. *Murphy*, 285 N. Y. 413, 416 (1941), which held that the State Legislature, in requiring *liquor dealers* to be licensed, intended that their failure to obtain a license should preclude them from recovery upon their contracts.

CONCLUSION

The foregoing review of the record and decisions below make peculiarly apposite, we think, the words of this Court in *Ruhlin et al.* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 (1938):

> "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' No such showing was attempted by the petition."

The petition should be denied.

Respectfully submitted,

THEODORE KIENDL
Attorney for Respondents
Joseph Reinfeld, Renfield Importers, Ltd. and Harold C. Levin (Renfield)

DATED: New York, N. Y.
July 16, 1956

THEODORE KIENDL
WILLIAM R. MEAGHER
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No. 187

JUL 30 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956

ARTHUR KAPLOW as executor of the estate of ABRAHAM RUTKIN deceased, herein formerly named as James Rutkin,

Petitioner,

—against—

JOSEPH REINFELD, SAMUEL BRONFMAN and ALLEN BRONFMAN, individually, and as co-partners doing business under the style and name of BRONFMAN INTERESTS and BROWNE-VINTNERS CO. INC., RENFIELD IMPORTERS, LTD., and HAROLD C. (SONNY) LEVIN, also known as HAROLD C. RENFIELD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SAMUEL BRONFMAN, ALLEN BRONFMAN and BROWNE-VINTNERS CO., INC. IN OPPOSITION

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—against—

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No. 187

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, SAMUEL BRONFMAN, ALLEN BRONFMAN and BROWNE-VINTNERS CO., INC. IN OPPOSITION

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly apply the statute of limitations of the State of New York?

2. Did the Court of Appeals correctly hold that under New York law petitioner's claims were barred by illegality?

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STATEMENT

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals which dismissed the complaint and reversed a judgment in favor of petitioner's decedent (hereafter referred to as petitioner) because his two claims were barred by the applicable New York statute of limitations and because under New York law these two claims were unenforceable because of illegality.

During prohibition there was a bootlegging partnership in New Jersey of which petitioner was a member, which purchased liquor from outside the United States, principally in Canada, and brought it to this country for sale and distribution (R. 55-56). Respondent Reinfeld was described by petitioner as the general manager of this partnership (R. 56).

Respondents Samuel and Allen Bronfman, Canadian citizens and residents, were in 1931 officers of Distillers Corporation-Seagrams Limited, a Canadian holding company which had certain subsidiaries engaged in the distilling business in Canada (R. 921). Respondent Reinfeld was a customer of certain distributing companies in which the Bronfmans had an interest and which sold Seagram products; there was no other relationship or connection between the Bronfman respondents and the respondent Joseph Reinfeld.

In 1931 a pooling agreement was formed among Canadian distillers which substantially increased the price of Canadian liquor (R. 1210). Because of this price increase, Reinfeld and several of his bootlegging associates decided, for a small investment to take over the financially embarassed L.L.&B. Distillery, which was located in Canada, and negotiated for the acquisition of this distillery (R. 1211-1212).

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In the fall of 1931 Reinfeld learned that the pool was being terminated and asked Samuel Bronfman to take him "off the hook" and take over the L.L.&B. Distillery which Bronfman agreed to do and did because Reinfeld was a good customer (R. 945, 1034, 1219). Petitioner alleged that Reinfeld received secret emoluments for not acquiring the L.L.&B. Distillery and that this transaction in 1931 between Joseph Reinfeld and Samuel Bronfman was the first act of a fraudulent conspiracy. As a member of the bootlegging partnership which planned to acquire this distillery petitioner alleged he was damaged and sought $22,000,000 damages in a complaint served in 1948 (R. 19).

Upon the repeal of prohibition certain of the bootlegging partners invested partnership funds in a New York corporation which they formed to engage in a legitimate liquor distributing business. They called this corporation Browne-Vintners Co., Inc. (R. 1474), and kept secret the fact that it was they who owned it. Their stock was held by innocuous nominees (R. 76-80).

In December 1940 the assets of this corporation were sold to Distillers Corporation-Seagrams Limited (Pl. Ex. 3; R. 2574) for $7,500,000 in cash and the assumption of company liabilities of approximately $8,000,000 (R. 2440). Petitioner alleged that this was an inadequate price and as a stockholder (albeit a concealed one) he was proportionately injured. He alleged that this was the second act of the conspiracy which had defrauded him in 1931 and that it was part of the consideration for the L.L.&B. transaction. He served a supplemental complaint claiming damages of an additional $500,000 in 1951 (R. 25).

The issues were presented to a jury which awarded petitioner a verdict for $77,200 with interest and costs

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(R. 2560-62). The jury also found that the claim with reference to the L.L.&B. transaction arose on December 15, 1931 (R. 2531) and that petitioner should have become aware of this claim in the exercise of reasonable care between December 1931 and December 1932 (R. 2531). Although respondents requested such a charge the trial judge did not charge the jury with reference to illegality (R. 2489-90; 2494). The trial judge denied motions to dismiss which were made on several grounds including the ground that the claims were barred by the statute of limitations and by illegality (R. 2536, 2539). 122 F. Supp. 265.

REASONS FOR DENYING THE PETITION

The questions raised by the petition are narrow questions of New York law. Both questions were decided by the Court of Appeals in accordance with authoritative, unchallenged and long established decisions of the courts of New York State.

ARGUMENT

Petitioner has failed to establish that the decision of the Court of Appeals on an important state question is in conflict with state law, as is required by Supreme Court Rule 19, subd. 1(b). Petitioner makes no attempt to show that the questions of local law involved are of such importance as to require the review by this Court of the conclusions of the Court of Appeals. See *In Re Woods*, 143 U. S. 202, 206 (1892).

In the absence of a showing of plain error by the Court of Appeals (*Francis* v. *Southern Pacific Co.*, 333 U. S. 445 (1948)) this Court traditionally accepts "the deter-

mination of local law by the Court of Appeals" *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530 at p. 534 (1949); e.g.: "Since the federal judge making those findings is from the * * * * bar, we give special weight to his statement of what the * * * * law is." *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956); *MacGregor* v. *State Mutual Co.* 315 U. S. 280 (1942).

There is no basis for granting this petition to review the determination of the Court of Appeals since it correctly applied well established principles of New York law.*

I

THE COURT OF APPEALS CORRECTLY APPLIED THE NEW YORK STATUTE OF LIMITATIONS.

In the words of the Court of Appeals, petitioner has attempted "to make a shambles of the statute of limitations and pervert its salutary purpose to set stale claims at rest" by alleging that the two acts of which he complains were committed pursuant to a civil conspiracy and that the statute of limitations runs from the time the conspiracy has ended and not from the date of each injury (Petition Appendix A, p. 27). This is not the law of New York and never has been.

The New York Court of Appeals in *Brackett* v. *Griswold*, 112 N. Y. 454 (1889), held:

> "But a mere conspiracy to commit a fraud is never of itself a cause of action, * * *. In other words, the

*The Court of Appeals decision was written by the Hon. J. Edward Lumbard, United States Circuit Judge, a member of the bar of the State of New York, formerly a justice of the Supreme Court of the State of New York, and formerly the United States Attorney for the Southern District of New York.

> principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or cooperation. * * *"

This rule is well established in New York. *Green* v. *Davies*, 182 N. Y. 499 (1905); *Werbelowsky* v. *Rosen*, 260 App. Div. 222 at p. 226 (2d Dep't 1940); *Purofied Down Products Corp.* v. *National Association*, 97 N. Y. S. 2d 683 at p. 684 (Sup. Ct. Kings Co. 1950). In fact it is a statement of the basic concept of civil conspiracy. *Nalle* v. *Oyster*, 230 U. S. 165, 182 (1913); *Lewis Invisible Stitch Mach. Co.* v. *Columbia Blindstitch Mach. Mfg. Corp.*, 80 F. 2d 862, 864 (2d Cir. 1936).

A natural consequence is that the statute of limitations begins to run from the date of each injury incurred pursuant to a civil conspiracy. In *Pollack* v. *Warner Bros. Pictures, Inc.*, 266 App. Div. 118, 120 (1st Dep't 1943), the plaintiff sued to recover on a cause of action which alleged that the directors and officers of the defendant corporation, pursuant to a conspiracy to that end, had failed to perform their duties and wasted corporate assets by committing five separate acts. The Court held that the statute ran "from the date of the commission of each separate wrongful act."

This is the prevailing rule in the United States: *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), cert. denied 336 U. S. 967 (1949); *Burnham Chemical Co.* v. *Borax Consolidated, Ltd.*, 170 F. 2d 569 (9th Cir. 1948), cert. denied 336 U. S. 924, 955 (1949); *Suckow Borax Mines Consolidated* v. *Borax Consolidated, Ltd.*, 185 F. 2d 196 (9th Cir. 1950); *Williamson* v. *Colum-*

bia Gas & Electric Corp., 186 F. 2d 464 at p. 469 (3d Cir. 1950); *Park-In Theatres, Inc.* v. *Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727 at p. 729 (D. Del. 1950) aff'd 185 F. 2d 407 (3rd Cir. 1950), cert. denied 341 U. S. 950 (1951).

The Court of Appeals followed these authorities and applied the appropriate New York statutes of limitation to each of the two injuries. Since the first alleged injury occurred in 1931 and the jury specifically found that plaintiff should have become aware of it in December 1932, the Court of Appeals held that regardless of what New York statute of limitations applied, suit on this claim was barred "long before he brought the action in 1948" (Petition, Appendix A, p. 27).

The Court of Appeals held that petitioner's claim with reference to the sale of Browne-Vintners Co., Inc. for an inadequate consideration was a wrong suffered by that corporation and was an action "by or on behalf of a corporation against * * * a former director, officer or stockholder to procure judgment on the ground of fraud" and thus was barred by § 48(8) of the New York Civil Practice Act (Petition, Appendix A, p. 27).

Petitioner claims that the basic error of the Court of Appeals was its failure to recognize that there is a cause of action for civil conspiracy in New York and that § 53 of the New York Civil Practice Act sets forth the statute of limitations applicable to this cause of action. § 53 of the New York Civil Practice Act reads:

> "§ 53. *Limitation where none specially prescribed.* An action, the limitation of which is not specifically prescribed in this article, must be commenced within ten years after the cause of action accrues."

Petitioner does not cite one case in any jurisdiction which ever applied any such rule. In support of his contention he cites the same two New York cases he cited to the Court of Appeals: *Duane Jones Company, Inc.* v. *Burke*, 306 N. Y. 172, 117 N. E. 2d 237 (1954); *Kewiczky* v. *Lorber*, 290 N. Y. 297, 49 N. E. 2d 146 (1943) and, oddly enough since it holds specifically to the contrary, *Green* v. *Davies*, 182 N. Y. 499, 75 N. E. 536 (1905). In *Green* v. *Davies* the court followed and quoted *Brackett* v. *Griswold, supra*.

In both the *Duane Jones* and the *Kewiczky* cases the wrong sued upon was not the conspiracy but the tortious act performed by the conspirators. Neither case involved the application of the statute of limitations. In the *Duane Jones* case the defendants, who were former employees of plaintiff, left and took with them several substantial advertising accounts and much of plaintiff's staff. In the *Kewiczky* case the actionable wrong was an intentional injury to business; this case is even cited for the proposition that allegations of conspiracy in a civil action serve merely to "link together" the defendants. *Levine* v. *Schaffzin*, 99 N. Y. S. 2d 254 (Sup. Ct. Kings Co. 1950). See also *O'Driscoll* v. *Sanders*, 99 N. Y. S. 2d 674 (Sup. Ct. Bx. Co. 1950).

To support the proposition that the statute of limitations runs from the date the conspiracy is concluded, petitioner repeats the cases cited by the trial judge of *Breese* v. *United States*, 203 F. 824 (4th Cir. 1913) and *Eldredge* v. *United States*, 62 F. 2d 449 (10th Cir. 1932). These cases involve a *criminal* conspiracy in which the conspiracy itself is the crime regardless of the acts done by it. The statute of limitations runs from the time the crime (the conspiracy) is completed. This is a different rule from that applicable

in civil cases. *Momand* v. *Universal Film Exchanges*, 172 F. 2d 37 (1st Cir. 1948), cert. denied 336 U. S. 967 (1949); *Green* v. *Davies*, 182 N. Y. 499 (1905).

After citing these inapplicable cases petitioner makes several *arguendos*. He states that even if there is no cause of action for conspiracy and the statute runs from each injury that nevertheless, neither of these two claims is barred. He argues that the L.L.&B. claim would be governed by the six year limitation on actions based on fraud pursuant to § 48(5) of the New York Civil Practice Act and is not barred because the fraud was not discovered until 1946. However § 48(5) has been interpreted to mean that the statute runs from the date the injured party *should* in the exercise of reasonable diligence have become aware of his claim. *Higgins* v. *Crouse*, 147 N. Y. 411 (1895); *Sielcken-Schwartz* v. *American Factors Ltd.*, 265 N. Y. 239, 192 N. E. 307 (1934); *Kelly* v. *City of New York*, 276 App. Div. 540 (1st Dep't 1950) aff'd without opinion, 302 N. Y. 589, 96 N. E. 2d 893 (1951). Petitioner cites no contrary cases. The jury expressly found petitioner should have become aware of his claim in 1931; this statute would have run in 1937; suit was not instituted until 1948.

Petitioner then states that assuming the L.L.&B. claim was barred, the Browne-Vintners claim survives because it was in fact a claim for fraud under § 48(5) of the New York Civil Practice Act and not a claim for a wrongful act done to a corporation by its former officer. (§ 48(8) N. Y. Civil Practice Act.) This is a claim by petitioner that he had an interest in the New York corporation, Browne-Vintners Co., Inc. and that because Reinfeld, its officer, caused the corporation to be sold for an inadequate price, petitioner did not (as a secret shareholder) receive his proper share. *Hastings* v. *Byllesby & Co.*, 293 N. Y.

413 (1944) and the companion case of *Hastings* v. *Byllesby & Co.*, 293 N. Y. 404 (1944) are directly in point. In these cases suit was brought by a receiver representing corporate creditors to recover for waste of corporate assets as a result of a fraudulent conspiracy between the directors of the corporation and third persons, resulting in their unjust enrichment. The New York Court of Appeals applied § 48(8) of the New York Civil Practice Act and held that the action was not one based on fraud and that the statute of limitations ran from the date of injury and not of discovery.

See also: *Public Shoe Stores, Inc.* v. *Goldstein*, 225 App. Div. 350 (1st Dep't 1929); *Zwerdling* v. *Bent*, 264 App. Div. 195 (1st Dep't 1942), aff'd without opinion, 291 N. Y. 654 (1943).

II

THE COURT OF APPEALS CORRECTLY APPLIED NEW YORK LAW IN HOLDING THAT PETITIONER'S CLAIMS WERE BARRED BY ILLEGALITY.

A. The Court of Appeals correctly applied New York law in holding that petitioner's claim based on the L.L.&B. transaction was illegal and unenforceable.

Petitioner himself refers to the L.L.&B. transaction as "the planned acquisition of the L.L.&B. Distillery by the liquor partnership in 1931, prior to the Repeal of the Prohibition Amendment" (Petition, p. 16). The so-called "liquor partnership" was, in fact, a million dollar bootleg combine. The acquisition of the L.L.&B. Distillery in Canada was admittedly a venture of the combine. Any injury resulting from the alleged conspiracy was an injury to the partnership and, in order for petitioner to recover damages as a result of this injury, he must first prove

(which he did) that he was a member of this illegal bootleg combine.

The Court of Appeals held that regardless of whether or not this particular venture was illegal that "a member of such an illegal partnership is not entitled to enforcement of any right depending on the partnership agreement. (Citations)." (Petition, Appendix A, p. 34). In *Parise* v. *Pepe*, 270 App. Div. 769, 59 N. Y. S. 2d 497 (2d Dep't 1946), cited by the Court of Appeals, plaintiff, an unlicensed partner in a package liquor store, was refused an accounting because the partnership was illegal. See also *Orr* v. *Pfohl*, 84 N. Y. S. 2d 23 (Sup. Ct. Onondaga Co. 1948); *Courtney* v. *Riordan*, 192 Misc. 53 (Sup. Ct. Erie Co. 1948).

This rule in itself makes petitioner's claim based on the L.L.&B. transaction unenforceable regardless of whether the bootleg combine planned to purchase a distillery (two years before the repeal of prohibition) to manufacture liquor for sale before or after repeal. The Court of Appeals however specifically held that the evidence was so convincing that a jury should not have been permitted to make a finding other than that the intention of the bootleggers in buying a distillery was to acquire a cheap source of bootleg liquor for illegal sale in the United States, and that even if made in Canada such a contract is unenforceable (Petition, Appendix A, p. 33). Petitioner cites no contrary authorities.

Petitioner's remaining contention with reference to the L.L.&B. transaction is that New York law holds that the repeal of prohibition makes recovery on a claim formerly unenforceable, enforceable. He cites four New York cases in support of this proposition, each decided before 1938, at which time there was confusion in New York concerning this point. However, any confusion there might have been

was ended when in 1947 the Appellate Division of the New York Supreme Court decided *Toll* v. *Friedman*, 272 App. Div. 587 (1st Dep't 1947) and held at p. 589:

> "A contract entered into in violation of law is not automatically purged of its illegality by mere repeal of the prohibitory statute. Such contracts remain illegal even after repeal and continue to be unenforcible until such time as the taint of illegality is removed. That occurs only when the Legislature manifests an intention to give them validity."

Since then, the New York courts have held that repeal does not purge an illegal contract of its illegality. *Shapiro Paper Corp.* v. *Armstrong Publications, Inc.*, 276 App. Div. 841 (1st Dep't 1949); *Dunmar Robes* v. *Buenaventura*, 279 App. Div. 286 (1st Dep't 1952); *Government of the French Republic* v. *Cabot*, 190 Misc. 517 (Sup. Ct. N. Y. Co. 1947); *Marcomo Stevedoring Corp.* v. *Nathanson*, 202 Misc. 154, 158 (Sup. Ct. Kings Co. 1951).

B. The Court of Appeals correctly applied New York law in holding that petitioner's claim based on the Browne-Vintners transaction was illegal and unenforceable.

When it became apparent the highly profitable bootlegging enterprise was doomed because of the repeal of prohibition, the bootlegging partners decided to form a legitimate enterprise for the sale of liquor.

Unfortunately for them, the state legislature placed severe restrictions on obtaining a liquor license and required that the names of all persons "interested or to become interested, in the traffic of liquor for which this application is made" be stated in the application for a liquor license. § 110 of the New York Alcoholic Beverage Control Law. (R.

2596, question 13) The gentlemen whose interest in Browne-Vintners was concealed were precisely the type the state legislature intended to prevent from trafficking in liquor. These men included not only petitioner but Abner "Longie" Zwillman (R. 268-271) and Joseph Stacher, a "reputably well known racketeer" (R. 277). Petitioner himself testified that he knowingly allowed his interest to be concealed "because I was in the bootlegging business" (R. 296).

In order for petitioner to recover for an injury to this illegally concealed interest, he had to assert rights to it. In *Flegenheimer* v. *Brogan*, 284 N. Y. 268 (1940), the New York Court of Appeals held that the administratrix of the well known bootlegger Dutch Schultz could not assert rights to capital stock of a corporation allegedly owned by Dutch Schultz but kept secret from the authorities. The Court held, at p. 272:

> "In effect then, this action is one brought by an alleged secret owner to vindicate his assertion of beneficial title to property he had parted with in order to perpetrate a fraud upon the statute which regulates and controls traffic in alcholic beverages."

Petitioner also argues that a knowingly illegally concealed interest can nevertheless be enforced, citing a case involving a milk dealer. *Rosasco Creameries, Inc.* v. *Cohen*, 276 N. Y. 274 (1937). The New York Court of Appeals however has stated that the rule with reference to liquor dealers is otherwise. *Carmine* v. *Murphy*, 285 N. Y. 413, 416 (1941).